As a result, this Respondent respectfully submits that Certiorari is inappropriate since the Petitioner lacks standing as required by Article 3, Section 2 of the United States Constitution. Accordingly, this Court should deny the Petition.

B. <u>The Issue Petitioner Asserts is Moot</u>

It has been long held that federal courts do not have power over issues that "cannot affect the rights of the litigants in the case before them." *DeFunis v. Odegaard*, 416 So.2d 312, 316, 94 S.Ct. 1704, 1705, 40 L.Ed.2d 164 (1974). Article 3 sets forth the standing requirements for a case or controversy, and also bars Artlice 3 courts from hearing moot cases. *See id.* This Court has defined mootness as "the doctrine of standing set in a time frame: the requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness)." *United States Parole Comm'n v. Geraghty*, 445 U.S. 338 at 397, 100 S.Ct. 1202 at 1209, 63 L.Ed.2d 479 (1980). A claim must therefore maintain its vitality throughout the litigation by adversely affecting the plaintiff. *See Boyle v. Landry*, 401 U.S. 77, 78, 80-81, 91 S.Ct. 758, 758-760, 27 L.Ed. 696 (1971).

In this case, Petitioner seeks to have this Court resolve whether the Florida Supreme Court and courts below it erred by allowing dismissal of Petitioner's claim. The issue he presents, whether Fla. R. Civ. P. 1.420(e) violated his Due Process rights under the Fourteenth Amendment, was rendered moot because Petitioner filed two additional complaints on either side of the month that the Florida trial court ruled on a Motion to Dismiss for Failure to Prosecute under Rule 1.420(e). Petitioner's issue, right or interest in a federal claim or appeal therefore became moot when Petitioner filed these additional lawsuits, which seek redress for the same or similar allegations.

C. **Dismissal for Lack of Prosecution did not Violate Petitioner's Due Process Under the Fourteenth Amendment.**

At the outset, it is important to note that this and other federal courts have repeatedly held that dismissal for failure to prosecute is an inherent power in Article 3 courts that does not violate Due Process, *even when the trial court does not provide notice or a hearing regarding the dismissal. See Chambers v. NASCO, Inc.*, 501 U.S. 32, 43, 111 S.Ct. 2123, 2132, 115 L.Ed. 27 (1991); *Link v. Wabash R. Co.*, 370 U.S. 626, 629, 82 S.Ct.

1386, 1388, 8 L.Ed. 734 (1962); *Byrne v. Nezhat*, 261 F.3d 1075, fn.88 (11th Cir. 2001); *Mulbah v. Detroit Bd. of Education*, 261 F.3d 586, 589 (6th Cir. 2001); *Gardner v. U.S.*, 211 F.3d 1305 (D.C. Cir. 2000); *Adams v. Trustees of New Jersey Brewery*, 29 F.3d 863, 871 (3d Cir. 1996). This Court, in *Link*, gave several examples of district courts that had enacted local rules for the purpose of facilitating dismissal for failure to prosecute. *See Link*, 370 U.S., 82 S.Ct. at fn.7. According to this Court, such rules are necessary and their authority "cannot be seriously doubted." *Link*, 370 U.S. at 629, 82 S.Ct. at 1388. This Court also held

> The power to invoke this sanction is necessary in order to prevent undue delays in the disposition of pending cases and to avoid congestion in the calendars of the District Courts. The power is of ancient origin, having its roots in judgments of nonsuit and non prosequitur entered at common law . . . and dismissals for want of prosecution in bills of equity. It has been expressly recognized in Federal Rule of Civil Procedure 41(b) . . . .
>
> *Link*, 370 U.S. at 629-630, 82 S.Ct. at 1388.

State rules providing for dismissal accomplish the exact same purpose at the state level. Rule 1.420(e), the rule

challenged by Petitioner, provides the following framework for dismissal for failure to prosecute:

> **Failure to Prosecute.** All actions in which it appears on the face of the record that no activity by filing of pleadings, order or court, or otherwise has occurred for a period of 1 year shall be dismissed by the court on its own motion or on the motion of any interested person, whether a party to the action or not, after reasonable notice to the parties, unless a stipulation staying the action is approved by the court or a stay order has been filed or a party shows good cause in writing at least 5 days before the hearing on the motion why the action should remain pending. Mere inaction for a period of less than 1 year shall not be sufficient cause for dismissal for failure to prosecute.
>
> Fla. R. Civ. P. 1.420(e).

The Florida Rule therefore goes beyond the guidelines established for federal courts and requires notice, an opportunity to show good cause, and a hearing before dismissal is permitted. *See id.* The trial court in this matter followed these procedures, but found good cause to be lacking, and dismissed accordingly and well within the requirements of Due Process established by this and the Florida Supreme Court. Petitioner even spoke personally at the hearing on the Motion to Dismiss. The fact that the case has been appealed through the Second District Court of Appeal for the State of Florida and the Florida Supreme Court

without reversal supports the fact that the courts met Petitioner's Due Process requirements. *See Cosio v. Keithly*, 907 So.2d 1170 (Fla. 2005); *Cosio v. Keithly*, 889 So.2d 1017 (Fla. 2d DCA 2005).

Petitioner relies primarily on *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 102 S.Ct. 1148, 71 L.Ed.2d 265 (1982) for the authority by which he believes this Court will find that Fla. R. Civ. P. 1.420(e) violates the Due Process Clause of the Fourteenth Amendment. *Logan* does not deal with dismissal for failure to prosecute, nor does it discuss or involve a state rule of procedure. It does provide a framework for determining whether a violation of Due Process exists. This Respondent does not dispute that the first part of *Logan's* analysis, the determination of whether Petitioner was deprived of a protected property interest, is satisfied. Certainly Petitioner's claim is a recognized property interest. Its dismissal constitutes a permanent loss of that interest.

The second part of *Logan's* analysis requires the Court to determine the level of process due. *See Logan*, 455 U.S. 422, 429, 102 S.Ct. 1148, 1154. Petitioner's argument fails here, as

Logan held that the complained-of dismissal requires, at a minimum, notice and the opportunity for hearing. *See id.* Again, *Logan* did not deal with a procedural rule for dismissal for failure to prosecute, which distinguishes this case from the many cases cited above holding that notice and a hearing are not necessary. Instead, *Logan* dealt with the Fair Employment Practices Act's adjudicatory procedures and the Illinois Fair Employment Practices Commission's failure to hold a statutorily mandated fact-finding and settlement conference within 120 days of the filing of an employment discrimination claim. *See Logan*, 455 U.S. at 422, 102 S.Ct. 1150.

Petitioner's argument fails because he was afforded the Due Process protections required by *Logan*, which exceed those mandated by this Court for dismissal of cases for failure to prosecute under Federal Rule 41(b). Petitioner, in his own brief, concedes that he had hearings on the motion to dismiss for failure to prosecute on August 13, 2003, September 16, 2003, and October 9, 2003. *See Petition for Writ of Certiorari* at 5-6. Prior to the September 16, 2003 and October 9, 2003 hearings, Petitioner filed affidavits in support of his position that he had

good cause. Petitioner was certainly afforded notice, opportunities to file arguments against dismissal, several hearings, and the opportunity to address the trial court personally.

CONCLUSION

For the foregoing reasons, Respondent, Tampa Health Care Center, respectfully requests this Honorable Court to deny the Petition for Writ of Certiorari. The constitutional safeguards in place for dismissal for failure to prosecute are well established, Petitioner lacks standing in this case, his issue is moot, and the trial court exceeded the minimum requirements of Due Process under the Fourteenth Amendment.

Respectfully Submitted,

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NOTARIZED AFFIDAVIT OR DECLARATION IN COMPLIANCE WITH 28 U.S.C. § 1746(2) AND SUPREME COURT RULE 29(c)

I HEREBY CERTIFY, that three (3) true and correct copies of this Brief in Opposition to Petition for Writ of Certiorari were sent via U.S. Mail on January 14, 2006 to the following:

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I declare under penalty of perjury that the foregoing is true and correct. Executed on January 14, 2006.

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STATE OF FLORIDA

HILLSBOROUGH COUNTY

BEFORE ME, the undersigned authority, personally appeared Daniel S. Green, who is personally known to me, and who did take an oath, and deposes and says the foregoing is true and correct in all respects.

SWORN TO AND SUBSCRIBED before me, this 14th day of January, 2006.

s/Jennifer C. Schoppman
Jennifer C. Schoppman
NOTARY PUBLIC,
State of Florida
At Large

My Commission Expires:

(3)

Supreme Court, U.S.
FILED
FEB 7 - 2006
OFFICE OF THE CLERK

Docket No. 05-771

IN THE
SUPREME COURT of the UNITED STATES

CARL W. COSIO,
Petitioner,

v.

BARBARA BOYD KEITHLY, LEROY H. MERKLE, JR., TIMOTHY P. MORAN, AND TAMPA HEALTH CARE CENTER,
Respondents.

On Writ of Certiorari from The Supreme Court of Florida

PETITIONER'S REPLY BRIEF REGARDING HIS PETITION FOR WRIT OF CERTIORARI

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BEST AVAILABLE COPY

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ARGUMENT

Tampa Health Care Center's acknowledgment in its corporate disclosure statement that it's identity is Beverly Health and Rehabilitation Services, Inc. proves that it's counsel falsely represented to the Petitioner's counsel that Beverly Health and Rehabilitation Services, Inc. was not the correct party in the action. This acknowledgment proves that Tampa Health Care Center's counsel intentionally made a false representation to Petitioner's counsel in an attempt to delay the lawsuit to what he perceived as the so called 1 year date for "record" activity.

Beverly Health and Rehabilitation Services, Inc.'s assertions that the other lawsuits filed by Petitioner concern the same or similar allegations as those at issue in this case are 100% false. The other two lawsuits do not concern the same facts and issues and have nothing to do with the lawsuit that is at issue in this case. It is for these reasons that Beverly Health and Rehabilitation Services, Inc. did not attach the Complaints, or any of the other pleadings, from the other lawsuits and did not even advise this Court of the case #'s of the other two lawsuits.

Contrary to Beverly Health and Rehabilitation Services, Inc.'s assertions, the other two lawsuits do not concern the injuries that are the subject of this Petition and lower court lawsuit. To the contrary, this Petition is Petitioner's one, only, and last bite at the apple regarding his injuries. Because the applicable statute of limitations has expired, the Petitioner cannot file another lawsuit regarding his injuries.

This Court should know that the Florida Supreme Court's recent decision in Wilson v. Salamon, SC04-140, S. Ct. Fl (October 20, 2005) proves beyond any doubt that the trial court erred in dismissing Petitioner's lawsuit. In Wilson, the Florida Supreme Court held that a motion to appear pro hac vice as co-counsel was 'record' activity for purposes of Rule 1.420 and that all activity of 'record' is 'record' activity. Because there was substantially more 'record' activity in the case at bar than in Wilson, it is clear that the trial court erred in dismissing Petitioner's lawsuit. Unless this Court accepts jurisdiction and grants this Petition, the Constitutional rights of Petitioner (that are set forth in his Initial Brief and that are set forth by the Florida Supreme Court in Wilson) will have been violated.

CONCLUSION

For all of the reasons set forth above and in the Initial Brief, the Petitioner requests for this Honorable Court to grant this Petition and reverse the trial court's Order entered on October 16, 2003 and the corresponding dismissal of the lawsuit and action.

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NOTARIZED AFFIDAVIT DECLARATION OF SERVICE IN COMPLIANCE WITH 28 U.S.C. § 1746

I, CARL W. COSIO, HEREBY DECLARE AND CERTIFY under penalty of perjury that three (3) true and correct copies of this Reply Brief Regarding His Petition for a Writ of Certiorari have been sent by U.S. mail on February 9th, 2006 to the following, who represent all of the parties that are required to be served:

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STATE OF FLORIDA

COUNTY OF HILLSBOROUGH

I hereby certify that on this day, before me, a Notary Public, duly authorized in the state and county named above to take acknowledgments, personally appeared Carl W. Cosio who is personally known to and who signed this in my presence.

Witness my hand and seal in the county and state named above this 7th day of February 2006.

Stephanie Meacham
Commission #DD225413
Expires: Aug 09, 2007
Bonded Thru
Atlantic Bonding Co., Inc.

Stephanie Meacham
Notary Public/Commission No.

(Notary name typed, printed or stamped)